No. 4634.

United States Circuit Court of Appeals

For the Ninth Circuit

T. H. JOHNSON,

Appellant,

vs.

MATT W. STARWICH, as Sheriff of King County, State of Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT.

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STATEMENT OF THE CASE.

On the 9th day of January, 1925, in a proceeding instituted in the Superior Court of the State of Washington, for King County, entitled as follows:

In the Superior Court of the State of Washington for King County.

Before the Honorable Mitchel Gilliam,

Judge, Acting as Extradition Commissioner.

No. 179090.

In the Matter of the Extradition of R. C. James, alias T. H. Johnson,

an amended complaint was filed, sworn to by one Bert C. Ross, in which it is alleged, in substance, that the above named James, alias Johnson, did on the 12th day of December, 1924, commit the crime of robbery at the City of Nanaimo, in the Province of British Columbia, and that said James, alias Johnson fled from British Columbia, and is in King County, State of Washington. (Tr. pp. 8, 9, 10 and 11.)

Whereupon a warrant of arrest, dated January 9, 1925, was issued, the caption of which is as follows:

In the Superior Court of the State of Washington for King County.

Before the Honorable Mitchell Gilliam,

Judge, Acting as Extradition Commissioner

In the Matter of the Extradition of R. C. James, alias T. H. Johnson.

This warrant is signed by Mitchell Gilliam,

"Judge of the Superior Court of the State of Washington, a Court of Record and of General Jurisdiction, Acting as Extradition Commissioner under and by virtue of the laws of the United States."

It is directed in the name of

"The State of Washington, to the Sheriff of King County," and commands him to apprehend said James, alias Johnson, and bring him before the above named Judge.

It is recited in the warrant that:

> " * * * complaint has been made before me, a Judge of the Superior Court of the State of Washington, a court of general jurisdiction, and authorized to hear complaints and issue warrants under Section 5270 of the Revised Statutes of the United States, that R. C. James, alias T. H. Johnson, has been guilty and stands charged with the crime of robbery, * * * committed on the 12th day of December, 1924, in the City of Nanaimo, County of Victoria, Province of British Columbia and Dominion of Canada." (Tr. pp. 11, 12, 13.)

This warrant was placed in the hands of the appellee, Sheriff of King County, State of Washington, and was by him executed by arresting the appellant and confining him in the King County jail, where he was kept in confinement until the 12th day of January, 1925, when he was taken by the court, judge and proceeding, is substantially the

same as in the complaint and warrant, in which commitment it is ordered that appellant be remanded to the King County jail, there to remain until delivered up, etc. (Tr. pp. 38, 39, 40.)

Under this commitment appellant was taken to and confined in said jail by said sheriff.

While so confined appellant applied to the United States District Court for the Western District of Washington, Northern Division, for a writ of habeas corpus. (Tr. p. 1, *et seq.*) Thereupon the court issued its order directed to the said sheriff, said sheriff before the judge issuing the warrant, whereupon testimony was taken in support of the facts alleged in said complaint, and thereafter, and on the 15th day of January, 1925, a commitment was issued by said judge, the caption of which, as to commanding him to show cause why a writ of habeas corpus should not be granted, as prayed for. (Tr. p. 41.) A return was made to the order to show cause, and a demurrer to the petition for the writ was filed by the sheriff. The matter being submitted to the court its order and judgment was made and entered discharging the rule to show cause and denying the petition for the writ, (Tr. p. 43) from which order and judgment appellant duly appealed to this court.

ARGUMENT.

There are two things, shown by the record, which stand out very prominently in this proceeding:

1. That the object of the proceeding was the extradition of this appellant to the Dominion of Canada, under the provisions of a treaty of extradition between the United States and Great Britain.

2. That it was instituted in the Superior Court of the State of Washington, and the process of the State of Washington, and its peace officer, was employed to apprehend the appellant.

Upon these facts we base the contention that the entire proceeding was *coram non judice.*

The State of Washington has no authority, and its courts have no jurisdiction, in proceedings for extradition under the provisions of a treaty between the United States and a foreign country.

In the case of *Holmes vs. Jennison,* 10 Law Ed. 579, the court, speaking of foreign extradition, says:

> "And it being conceded on all hands that the power has been granted to the federal government, it follows that it cannot be possessed by the States, because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government."

Hereafter, and under our first assignment of error, we will discuss the question whether a judge of a State court of record having general jurisdiction, has jurisdiction in a proceeding under a treaty of extradition with a foreign country. Assuming, at this stage, that he had such jurisdiction, the question is, can he exercise that jurisdiction through and by means of the process and officers of the State of Washington?

This involves the question as to whether Judge Gilliam acquired jurisdiction over the person of this appellant,and is covered by our second, third and fourth assignments of error:

II.

That the court erred in ruling that the said Judge Gilliam has jurisdiction over the person of said petitioner in said proceeding.

III.

That the court erred in refusing to hold that the warrant of arrest, under which petitioner was apprehended and taken before said judge in said proceeding, was invalid and void.

IV.

That the court erred in refusing to hold that the Sheriff of King County, State of Washington, was not authorized by law to execute warrants of arrest in said proceedings held before said Judge.

We quote that portion of Section 5270, of the U. S. Revised Statutes which is pertinent here:

> "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or a judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath charging any person found within the limits of any State, district or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered."

That the power conferred by this statute upon the specified officers is a *judicial power,* there is no doubt. In *re Metzger,* 17 Federal Cases, No. 9511, the court speaking of an extradition treaty, says:

> " * * * it is manifest that the provision demanding the apprehension and commitment of persons charged with crimes cannot be carried into effect in this country but by aid of *judicial authority.* Not only in the distribution of the powers of our government does it pertain to receive evidence and determine upon its sufficiency to arrest and commit for criminal offenses, but the prohibition in the constitution against issuing a warrant to seize any person except on probable cause first proved necessarily imports that issuing such warrant is a *judicial act.* * * * the government can only fulfill its engagement in this respect by the instrumentality of the *judicial tribunals.*" (Italics ours.)

There are not two different and distinct methods by which the officers specified in the statute may exercise the powers conferred upon them, dependent upon whether they be federal judges on the one hand, or judges of State courts on the other. The power conferred is a *federal judicial power,* in every instance, and by whatever judge it is exercised, to be exercised in exactly the same manner and by the same means, to-wit; by the use and employment of such *federal process as may be necessary to carry the power into effect.* The power of each of these officers being precisely the same, and to be exercised in precisely the same manner, the judge of a circuit or district court could as well issue a warrant of arrest in the name and by the authority of a State, and command that a peace officer of the State

execute it, as could the judge of a state court in the exercise of the same power. We contend, most emphatically, that none of these judges have the authority to invoke or employ the power and process of a State, and its peace officers, for the purpose of carrying into effect the powers vested in them by the statute. In every instance, we maintain, in which any of these judges attempt to exercise this power it should, and to be lawful, it must be, through the instrumentality of federal process. The warrant, which the statute empowers them to issue, should show on its face that it emanated by and under the authority of the United States; should be in its name, and should be directed to some officer authorized by its laws to execute warrants of arrest, *among which the sheriff of King County, State of Washington, is not included.* Under the federal procedure warrants of arrest are issued in the name of "The President of the United States of America," and are directed to a United States Marshal for service.

If it be true, as we contend, that in the exercise of the power conferred upon him by the statute, Judge Gilliam had no authority to issue a warrant under the authority and in the name of the State of Washington, and direct that it be executed by a

peace officer of that State, it follows, as a matter of law, that this warrant was void, and if that be true his aprpehension thereunder did not give Judge Gilliam jurisdiction over his person.

Whether or not this was a lawful warrant can, it occurs to us, be determined by a very simple test. As stated before, if Judge Gilliam, in the exercise of his powers under the statute, is authorized to issue a warrant of arrest such as this, it would follow that one of the judges of this court, in the exercise of the same power, could issue just such a warrant. If an officer, whose duty it is, under the law, to execute a warrant of arrest, or any other lawful process, refuses to do so it would constitute a contempt of court. Now, suppose a complaint, alleging the facts set forth in Section 5270 *supra,* was laid before one of the judges of this court, and a warrant issued such as this one, and the sheriff, to whom it was directed, refused to execute it, could he be punished for contempt of court? If he could not be it would be because the warrant was unauthorized by law, in other words, *because the warrant was void.*

It will not do to say that, regardless of the warrant, the party was actually before Judge Gilliam, and that fact would constitute jurisdiction

over his person. Unless he made a voluntary appearance, and the record shows that he did not, there is only one lawful way, under the statute, by which his appearance could be secured and jurisdiction over his person obtained, and that is by the issuance of a lawful warrant and his apprehension thereunder.

Our first assignment of error, which is:

That the court erred in ruling that Mitchell Gilliam, Judge of the Superior Court of the State of Washington, for King County, had jurisdiction over the subject matter of the proceeding in which he issued a warrant of arrest for the apprehension of petitioner, and upon which he based his warrant of commitment for the determination of petitioner, raises the question of jurisdiction over the subject matter, and this being a proceeding under a treaty for extradition between the United States and a foreign government, it is our contention that the provision of Section 5270 *supra,* conferring upon the judge of a state court a power which, in our discussion under assignments of error two, three and four, we have shown to be a federal judicial power, is obnoxious to the Constitution of the United States.

Sec. 1, Art. 2 of the Constitution, provides that:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * * "

Sec. 2, Art. 2, provides that:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * "

Our discussion of this point will be as brief as possible consistent with rendering our position intelligible. That position is:

That Congress has no power to vest federal judicial power in State courts, or judges of State courts, as such.

In Section 5270 *supra,* Congress has vested, what we have shown to be a *federal judicial power,* in "a judge of a court of record of general jurisdiction of any State." That Congress has the power to vest federal judicial power in any federal judge, or any competent person, such as a commissioner, whom the statute authorizes the federal judges to appoint, we do not question for a moment. But here the power is vested, not *in a person,* but *in a judicial officer.* The power is conferred upon the

judge of a State court, *as such,* and we can discern no distinction between conferring it upon a State Court, and the judge of a State court. And the proposition must be admitted, that if Congress has the power to vest a single federal judicial power in a State court, or the judge of a State court, as such, it has the power to vest every federal judicial power, with the exception of that which the Constitution vests exclusively in the Supreme Court, in State Courts, or the judges thereof. That Congress possesses no such power is about as well established as any question arising under the Constitution may well be. But why not? If Congress can vest *one federal judicial power* in a State Court, or one of its judges, why may it not vest them with *every federal judicial power,* not exclusively vested by the Constitution in the Supreme Court?

We have examined every reported case in the federal courts concerning extradition matters under treaties between the United States and foreign countries, and we remember but one in which the judge of a state court attempted to exercise the power conferred in Section 5270 *supra,* and in that case the question we are now presenting was not presented or discussed. We have been able to find no case in which it is held that Congress has the

power to vest State Courts, or the judges thereof, with federal judicial powers.

That this is beyond the power of Congress is laid down by the following text writers:

1 *Bailey on Jurisdiction,* Sec. 93, p. 73;
1 *Kent's Comm.* (14th Ed.) p. 395, *et seq;*
2 *Story on Const.,* Sec. 1754-5-6.

In *Houston vs. Moore,* 5 Law Ed. 25, Mr. Justice Washington said:

> "For I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any court except such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by exclusive jurisdiction of the federal courts."

Other cases in point are:

Martin vs. Hunter, 4 Law Ed. 97;
Robertson vs. Baldwin, 41 Law Ed. 716;
Novell vs. Heyman, 28 Law Ed. 390;
Slocum vs. Mayberry, 4 Law Ed. 169;
Claflin vs. Houseman, 23 Law Ed. 833.

The rule seems to be well settled that it is beyond the power of Congress to vest judicial power, which under the constitution is exclusively a federal judicial power, in the courts of a state. And the only question here is whether conferring an exclusively federal judicial power upon the judge of

a state court comes within the prohibition. As before stated we can discern no distinction between the *courts of a state,* and the *judges of the courts of a state.* To be sure there is a distinction between a "judge" and a "court," but that distinction does not exist here. The statute attempts to confer this power upon judges of state courts solely in their official capacity as judges of such courts, and not as individuals. When, as individuals, they cease to become judges of such courts they may no longer exercise the power conferred by the statute, and in the last analysis it is apparent that the power is really vested in the court to be exercised, as in the case of tis other powers, by and through its judges.

In conclusion, we again refer to the fact, which the record discloses, that this proceeding was instituted in the Superior Court of the State of Washington, for King County; that the process of the State was attempted to be employed; that jurisdiction over the person of appellant was obtained by means of this process, executed by a peace officer of the State, having no authority to execute process in a federal proceeding. If this be *coram judice* then the term *coram non judice* has neither application nor meaning, and should be relegated to the limbo of forgotten things.

It will not do to say that the record discloses that the appellant is charged with the offense of robbery in the Dominion of Canada, and that the evidence establishes probability of his guilt; that he ought to be extradited, and that these proceedings, notwithstanding their defects, are calculated to effect the desired result, in other words, that the end justifies the means and that "all's well that ends well."

Under the constitution and laws of these United States the appellant cannot be deprived of his liberty and extradited to a foreign country unless by due process of law, and due process of law is conspicuous in this proceeding only by its absence.

We respectfully submit that the order of judgment of the court below should be reversed and that the writ of habeas corpus be granted, and appellant restored to his liberty, that liberty of which he is now deprived, and threatened with extradition to a foreign country, in violation of his legal and constitutional rights.

Respectfully submitted,

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